Supreme Court, U.S.
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In The

Supreme Court of the United States

EVERETT PASLEY,

Petitioner,

vs.

KENNY ROBINSON, Warden,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does multiple Sixth Amendment constitutional violations in a capital first degree murder case deserve a stricter harmless Error standard for habeas corpus petitions?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

EVERETT PASLEY, Inmate, on a habeas corpus petition; KENN[illegible]OBINSON, Warden.

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CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE

Pasley v. Robinson, Court of Appeals, 6th Cir., Unpublished, No. 01-1923, (August 6, 2003). (Petition Appendix 1-14.)

Pasley v. Robinson, Federal District Court, Eastern District of Michigan, Unpublished, No. 99-60755, (May 31, 2001). (Petition Appendix 15-56.)

BASIS FOR SUPREME COURT JURISDICTION

Jurisdiction of this case is governed by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996) and 28 U.S.C. § 2254.

The Court of Appeals for the Sixth Circuit entered its judgment on August 6, 2003. (Petition Appendix 1-14.) This Court has jurisdiction under 28 U.S.C. § 1254(1) to review on a writ of certiorari the judgment of a Federal Court of Appeals. The Court of Appeals has decided an important question of federal law that has not been settled by this Court. (Sup. Ct. Rule 10)

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Constitution of the United States, Amendment XIV, Due Process Clause, and Amendment VI, the right of confrontation.

STATEMENT OF THE CASE

Mr. Everett Pasley and co-defendant Darrin Higgins were tried before separate juries in a single trial before Recorders Court Judge Prentiss Edwards. On September 30, 1986, the jury convicted Mr. Pasley of first degree murder, MCLA 750.529; MSA 28.767, and one count of possession of a firearm during the commission of a felony, MCLA 750.227b; MSA 28.424(2). Mr. Darrin Higgins, the co-defendant, was acquitted of the murder charge and convicted of the felony firearm charge.[1]

After the conviction, petitioner Pasley filed a direct appeal, raising four issues. (Pet. App. 22). The Michigan Court of Appeals affirm petitioner's convictions in an unpublished opinion. *People v. Pasley,* Michigan Court of Appeals No. 97185 (August 9, 1988) (Cl. App. Appx. Vol. I, pp. 10-16). Petitioner Pasley did not file for leave to appeal to the Michigan Supreme Court.

In July 1995, petitioner filed a Motion for Relief from Judgment in the trial court, raising six claims (Pet. App. 23). The trial court denied the motion, stating that "all of the issues raised by this Motion were considered on appeal." *People v. Pasley,* Recorder's Court for the City of Detroit Case No. 86-003155-02 (March 5, 1996) (Pet. App. 24). The Michigan Court of Appeals denied petitioner's delayed application for leave to appeal "for failure to meet the burden of establishing entitlement to relief under M.C.R. 6.508 (D)." *People v. Pasley,* Michigan Court of Appeals Docket No. 196626 (March 25, 1997) (Pet. App.

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[1] A factual summary of the case is noted in Petitioner's Appendix: pages 3-7; 22-24; and 44-48.

24). The Michigan Supreme Court denied petitioner's delayed application for leave to appeal, "because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508 (D)." *People v. Pasley,* Michigan Supreme Court Docket No. 109568 (April 27, 1998) (Pet. App. 24).

On April 23, 1999, petitioner filed a petition for a writ of habeas corpus presenting the same six claims raised in his Motion for Relief from Judgment (Pet. App. 24). On May 31, 2001, the Federal District Court denied petitioner's habeas claim and issued a lengthy decision. (Pet. App. 15-56).

Petitioner appealed to the Court of Appeals, Sixth Circuit, and on August 6, 2003, the Court of Appeals denied petitioner's habeas petition, ruling that the two Sixth Amendment constitutional errors concerning cross-examination and a *Bruton* violation, were harmless. (Pet. App. 1-14).

Both the Federal District Court and the Sixth Circuit Court of Appeals found that there were two grave constitutional errors in this first degree murder case. The first error concerned a *Bruton* violation, *Bruton v. United States*, 391 U.S. 123 (1968), and the second error concerned a cross-examination issue, strikingly similar to *Davis v. Alaska*, 415 U.S. 308 (1974), where the defense could not fully cross-examine the only witness at the trial who claimed that Mr. Pasley made incriminatory admissions.

Both the Federal District Court and Court of Appeals applied the harmless error standard announced in *Brecht v. Abrahamson,* 507 U.S. 619 (1993), to determine whether the constitutional defects were harmless error.

Multiple constitutional defects in a capital case for first degree murder must be adjudicated under a stricter harmless error standard. This appears to be a novel question of law: that multiple constitutional defects should require a different harmless error standard, more akin to *Chapman v. California*, 386 U.S. 18 (1967).

REASONS FOR GRANTING THE WRIT

I. MULTIPLE SIXTH AMENDMENT CONSTITUTIONAL VIOLATIONS IN A FIRST DEGREE MURDER CASE MUST REQUIRE A STRICTER HARMLESS ERROR STANDARD THAN THAT ANNOUNCED IN *BRECHT V. ABRAHAMSON*.

Trial errors, like in the instant case, were formerly subjected to the *Chapman* rule, from *Chapman v. California,* 386 U.S. 18 (1967). In *Chapman*, the Supreme Court held that if a constitutional error occurs, the government must prove beyond a reasonable doubt that the error was harmless, i.e., "that the error complained of did not contribute to the verdict obtained." A conviction could be upheld if the government convinced the appellate court beyond a reasonable doubt that, but for the error, the same verdict would have resulted.

Until 1993, federal courts did not distinguish between a direct appeal of a criminal conviction and a habeas corpus proceeding. But in *Brecht v. Abrahamson,* 507 U.S. 619 (1993), the Supreme Court modified *Chapman* and held that a less stringent harmless-error standard would apply to habeas proceedings. In *Brecht*, the Court adopted the harmless standard from *Kotteakos v. United States*,

328 U.S. 750, 765 (1946), which held that in determining harmlessness, an error must have "substantial and injurious effect or influence determining the jury's verdict." *Id.* at 776. Chief Justice Rehnquist reasoned in *Brecht* that it was illogical to require a federal court to engage in the same *Chapman* harmless error analysis that is already required of the state courts on direct review, prior to the matter reaching the federal courts. Furthermore, the Court expressed concerns for finality and comity in habeas proceedings.

This standard was affirmed in *O'Neal v. McAninch,* 513 U.S. 432 (1995), which held that the proper measure of harmlessness is whether the error 'had substantial and injurious effect or influence in determining the jury verdict,' not whether the record evidence is sufficient absent the minor error to warrant a verdict of guilt.

In interpreting the *Kotteakos* standard, Justice Rehnquist stated that the aggrieved petitioner is not entitled to habeas relief based on trial error unless the petitioner can establish that the error(s) resulted in actual prejudice. *Brecht v. Abrahamson, supra*, at 637. To apply the *Kotteakos* standard properly, the reviewing court, must make a de novo examination of the trial record. *Kotteakos, supra*, at 642. *Kotteakos* requires that a reviewing court decide that "the error did not influence the jury." *Brecht, supra*, at 642.

When Sixth Amendment violations occur, however, the gravity of jury influence is much greater than a typical procedural constitutional defect. Sixth Amendment constitutional errors are extraordinarily damaging and affect the substantive merits of the conviction.

A. THE SIXTH AMENDMENT CONFRONTATION VIOLATION DENIED PETITIONER HIS ONLY OPPORTUNITY TO TEST THE BIAS AND CREDIBILITY OF THE CHIEF PROSECUTION WITNESS CONCERNING INCRIMINATORY STATEMENTS.

Both the Federal District Court and the Court of Appeals found there was a constitutional violation in the denial of petitioner's right to cross-examine the prosecutor's only witness regarding petitioner's alleged incriminatory statements. (Pet. App. 40-43; and 9). In the instant case, witness Carlton O'Neal was the only person who testified that Mr. Pasley made incriminating statements. Indeed, witness O'Neal testified that two other persons were present when Mr. Pasley made incriminating statements, but these two other persons never testified.

When he originally testified, witness Carlton O'Neal never claimed that Mr. Pasley made incriminatory statements. Later in the trial, however, the prosecution recalled witness O'Neal and O'Neal then testified that Mr. Pasley made incriminatory remarks about the murder. Defense counsel was not allowed to cross-examine Mr. O'Neal about O'Neal's prior conviction and whether O'Neal's vulnerable status as a probationer made him susceptible to undue pressures with the prosecutor.

A particularized attack on credibility is indispensable to a constitutionally adequate confrontation. The confrontation safeguard is the primary tool to unravel the truth. *Davis v. Alaska,* 415 U.S. 308 (1974).

As the Supreme Court has recognized in countless cases, confessions are extraordinarily damaging and usually outcome determinative. *Mincey v. Arizona,* 437

U.S. 385 (1978); *New Jersey v. Portash,* 440 U.S. 450 (1979). Accordingly, state and federal courts have developed an enormous body of law designed to insulate jurors from unreliable confessions. See, *Culombe v. Connecticut,* 367 U.S. 568 (1961). Thus, the inquiry into the reliability of the alleged confession made to O'Neal must be subjected to rigorous scrutiny it is in this context that the Supreme Court's endorsement of probing cross-examination in *Davis v. Alaska, supra,* takes on a special meaning and consequently a stricter harmless error standard must apply.

B. THE *BRUTON* VIOLATION AGGRAVATED THE PREJUDICE.

Both the Federal District Court and the Court of Appeals found a *Bruton* violation in the instant case (Pet. App. 35-39). The *Bruton* error was aggravated by the prosecutor's closing arguments stressing petitioner Pasley's guilt based on statements made by co-defendant Higgins.

The Federal District Court and the Court of Appeals ruled that petitioner Pasley was denied his Sixth Amendment right to confrontation under *Bruton v. United States,* 391 U.S. 123 (1968) and *Mason v. Scully,* 16 F.3d 38 (2d Cir. 1994). The error was not harmless because: (1) petitioner was given no opportunity to cross-examine co-defendant Higgins regarding his extrajudicial statements; (2) the co-defendant's statement was powerfully incriminating and provided the prosecution with a critical link in their proofs; (3) the co-defendant's statement directly incriminated petitioner; (4) the co-defendant's statement was unreliable; (5) no other evidence directly implicated

petitioner Pasley in the shooting; and (6) no limiting instruction was given regarding the extrajudicial statements of the non-testifying co-defendant.

The error was compounded by the trial court's failure to instruct the jury that the co-defendant's accusation could not be used against petitioner Pasley or at a minimum that any statement by the co-defendant must be viewed with suspicion. *Bruton v. United States*, *supra,* 391 U.S. 123, 136 (accomplice testimony is "inevitably suspect"); *Crawford v. United States*, 212 U.S. 183, 204 (1908) (accomplice testimony is to be accepted only with great "caution"); *United States v. Marion,* 477 F.2d 330, 332, n. 1 (CA 6 1973) (accomplice testimony creates particular problems of credibility).

CONCLUSION

These multiple Sixth Amendment errors stand as one of the most extreme violations of the Right of Confrontation. Harmless error must be adjudicated on the basis of whether the errors were a compelling piece of evidence that undermines the Court's confidence in the verdict. Where multiple Sixth Amendment violations occur, the prosecution must be required to rebut the harmful prejudice or the courts should be more inclined to recognize the substantial and injurious affect of these errors on the jury. See for instance, *Calvert v. Wilson,* 288 F.3d 823 (6th Cir. 2002) (holding that the Federal District Court erred in finding harmless error in a *Bruton* violation); and *Stapleton v. Wolfe,* 288 F.3d 863 (6th Cir. 2002) (holding that the admission of accomplice's statements violated the Sixth

Amendment Confrontation Clause and were not harmless because they had no "adequate indicia of reliability.").

The standard in determining whether the constitutional errors alleged should be reversed based on harmless error requires that the court review the entire record de novo in determining whether the error influenced the jury's deliberations. *Brecht v. Abrahamson,* 507 U.S. 619, 640 (1993). However, "when a habeas court is in grave doubt as the harmlessness of an error that affects substantial rights, it should grant relief." *O'Neal v. McAninch,* 513 U.S. 432, 445 (1995).

Respectfully submitted,

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October 2003

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 01-1923

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

EVERETT PASLEY, *Defendant-Appellant,*	)	
v.	)	On Appeal from the United States District Court for the Eastern District of Michigan
KENNY ROBINSON, *Plaintiff-Appellee.*	)	

(Filed Aug. 6, 2003)

Before: **BOGGS and GILMAN, Circuit Judges; and DOWD, District Judge.***

PER CURIAM. Everett Pasley, the petitioner in this case, is a Michigan state prisoner who was convicted of felony murder and possession of a firearm during the commission of a felony. As a result of that conviction, Pasley is serving a mandatory life sentence with no possibility of parole. He now appeals a district court order denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Pasley contends that his Sixth Amendment rights were violated during the course of his trial because of limitations put on his cross-examination of a prosecution witness and the admission

* The Honorable David D. Dowd, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

into evidence of implicitly incriminating hearsay statements made by his co-defendant, who did not testify.[1] The district court held that although Pasley's Sixth Amendment confrontation rights had been violated, any error was harmless because there was strong evidence, untainted by Sixth Amendment error, that supported the jury's verdict. Pasley contends on appeal that the corroborative evidence of his guilt was insufficient for a conviction and that, therefore, the constitutional error perpetrated at trial was not harmless. For the reasons set out in this opinion, we affirm the district court's decision to deny Pasley's petition for a writ of habeas corpus.

I

Everett Pasley and his co-defendant, Darrin Higgins, were tried before separate juries in a single trial for the shooting of Troy Denard, which took place at approximately 7:15 p.m. on March 14, 1986. On September 30, 1986, a Michigan jury found Pasley guilty of first degree murder and possession of a firearm during the commission of a felony. Higgins was acquitted of the murder charge and convicted of the felony firearm charge.

The evidence at trial established that Earline Gibson, a neighbor who lived around the corner from Higgins, saw the deceased, Troy Denard, get into a small blue car driven by Higgins on the night Denard was killed. Gibson also

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[1] Everett Pasley and Darrin Higgins were tried before separate juries in a single trial. Higgins *did* testify before his own jury, but not in front of Pasley's, and thus for purposes of Pasley's appeal, Higgins is a non-testifying co-defendant.

testified that she recognized Pasley as a man she had seen with Higgins in the past, and saw him in the front passenger seat of the blue car. Pasley then got out of the car to get into the back seat, so that Denard could take the front passenger seat. While Pasley was shifting from the front to the back seat, Gibson spotted what she thought was the handle of a gun in Pasley's coat.

Kenneth Jones, an acquaintance of Denard's who was on the street talking to Denard on the night he was killed, also testified that Denard got into a blue car driven by Higgins that evening. Jones testified that there was someone else in the car, but he was unable to identify the other person. A short time later, Jones saw Denard running along the street, yelling for an ambulance because he'd been shot. When Jones asked Denard who shot him, Denard replied that it was "Darrin Higgins and that guy."

Randy Holman, the first officer on the scene, testified that when he got to Denard, he was still conscious and talking despite the fact that he had been shot twice in the head and once in the left shoulder area. Denard told Holman that he had been shot by Higgins and by the "occupant in the back seat." Denard gave a description of the other occupant of the car to Holman,[1] but Denard didn't know the other man's name. Later that evening in the hospital, Denard told his aunt, Paulette Moore, that "Darrin Higgins and Darrin Higgins' friend shot him." Denard died seven days later.

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[1] Holman was not asked by either side about the description Higgins gave of "the other man."

Medical examiner Marilee Frazier, who performed the autopsy on Denard, testified that there were three bullets shot into the deceased. Two of the bullets entered through the back of the head, and one through the left shoulder. Although one would imagine that each of these shots had to have been fired at close range if Denard was shot by Pasley and Higgins while inside the car, at the time of the autopsy there was no evidence of close-range firing, such as soot or gunpowder on Denard's skin. Frazier explained that the absence of such evidence suggested that Denard was shot from a distance of more than eighteen inches away. However, the prosecutor pointed out in his rebuttal argument at trial that since Denard did not die until seven days after the shooting and had undergone surgery in the interim, any evidence of close-range firing might have been removed by the time of his autopsy.

Pasley testified on his own behalf, denying any involvement in the shooting. According to his testimony. Pasley was in Ann Arbor, applying for a job with the Police Department the day that Denard was shot. He returned to Detroit at around 5:30 or 6:00 p.m. with his girlfriend, Sandra St. Clair, who is also Darrin Higgins's sister. Pasley testified that he slept at the Higgins family home, located in the neighborhood where Denard was shot, until 8:00 p.m., when he received a call from Higgins. Pasley stated that he drove his car to meet Higgins at a motel. Pasley registered a room in his name and then left the motel and returned to the Higgins home where St. Clair was waiting.

St. Clair supported Pasley's testimony up to a point. St. Clair testified that she and Pasley had in fact traveled to Ann Arbor the day of the shooting, so that he could apply for a job with the police department there, and that

they returned that evening to Detroit and took a nap at her family's home. However, St. Clair testified that Pasley left the house at about 7:30 or 7:45 p.m. that night and that when she looked outside after he left, her car, a blue Camaro, was gone, while his car remained at the house. St. Clair stated that sometime before 10:00 p.m., Pasley returned and drove her to the Crown Motel, where she retrieved her blue Camaro.

Carlton O'Neal, a man who lived with Higgins and his family, also testified against Pasley. O'Neal stated that a few days after the shooting, while at Higgins's house, he overheard Pasley say that if Higgins had not helped Denard get out of the car. Pasley would have killed Denard in the car. On cross-examination, defense counsel twice tried to question O'Neal about whether he was on probation. Each time, the prosecution's objection to questions about O'Neal's probationary status were sustained. Defense counsel was limited to eliciting an admission from O'Neal that he had been convicted of carrying a gun the year before.

Finally, the defense agreed to stipulate that if Sgt. Richard McCarty were called as a witness, he would testify that he arrested Pasley and that "the man he arrested fit the description given by Darrin Higgins of Mr. Pasley."

After deliberating for approximately two hours, the jury convicted Pasley, who soon after filed a direct appeal. The Michigan Court of Appeals affirmed Pasley's convictions in an unpublished opinion and Pasley did not file for leave to appeal to the Michigan Supreme Court. Pasley later filed a motion for relief from judgment in the trial court raising six separate claims, including the two Sixth

Amendment challenges at issue in this appeal. The trial court denied the motion, stating that "all of the issues raised by this Motion were considered on appeal." *People v. Pasley,* Recorder's Court for the City of Detroit Case No. 86-003155-02 (March 5, 1996). The Michigan Court of Appeals and the Michigan Supreme Court summarily denied Pasley's application for leave to appeal, stating only that he had failed "to meet the burden of establishing entitlements to relief under M.C.R. 6.508(D)". In 1999, Pasley filed this petition for a writ of habeas corpus with the district court, presenting the same six claims raised in his motion for relief from judgment in the state courts.

The district court found that Pasley's Sixth Amendment right of confrontation was violated twice during the course of the trial. First, as a result of the admission of Sgt. McCarty's testimony, which included the hearsay statements describing Pasley made by Pasley's co-defendant, who had not testified in front of Pasley's jury. Second, as a result of the trial judge's refusal to allow Pasley to question O'Neal about his probationary status. The district court held, however, that these constitutional errors were harmless since the jury could have found Pasley guilty on the basis of other evidence that was untainted, independent of the evidence that was improperly admitted at trial. The district court did not find any further constitutional error and denied Pasley's writ of habeas corpus.

Pasley now appeals the district court's denial of his petition for a writ of habeas corpus and limits his claims to the two Sixth Amendment violations discussed. Pasley argues that the district court was correct in finding violations, but incorrect in denying his writ on the basis of harmless error.

II

We review *de novo* the legal conclusions of the district court in its disposition of a habeas corpus petition pursuant to 28 U.S.C. § 2254. *Palazzolo v. Gorcyca,* 244 F.3d 512, 515 (6th Cir. 2001). Because this habeas petition was filed after April 24, 1996, it is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Pursuant to AEDPA, habeas corpus relief is unavailable with respect to any claim adjudicated on the merits in state court unless the adjudication:

> 1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> 2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2). In addition, for purposes of habeas review of state court decisions, findings of facts made by a state court are presumed to be correct and can only be contravened if the habeas petitioner can show, by clear and convincing evidence, that the state court's factual findings were erroneous. 28 U.S.C. § 2254(e)(1).

The facts in this case are undisputed, and thus Pasley is only entitled to habeas relief if he can meet one of the two bases for relief provided in § 2254(d)(1). In *Williams v. Taylor,* 529 U.S. 362, 405-06 (2000), the Supreme Court interpreted the language of § 2254(d)(1), and held that a decision by a state court is "contrary to" clearly established Supreme Court precedent if it "applies a rule that contradicts the governing law set forth" by the Supreme

Court or if it "confronts a set of facts that are materially indistinguishable" from a Supreme Court decision, and nevertheless arrives at a different result. The Court also discussed what qualifies as an "unreasonable application" of law according to § 2254(d)(1), and held that a state court's decision may not be overturned simply because this court believes that the state court applied Supreme Court precedent incorrectly. *Id.* at 411. *See also Bell v. Cone,* 535 U.S. 685, 699 (2002). Instead, the state court's application of Supreme Court precedent must be objectively unreasonable. *Woodford v. Visciotti,* 537 U.S. 19, 24-25 (2002).

III

Sixth Amendment Violations

Pasley argues that the introduction of certain hearsay statements made by his co-defendant, Darren Higgins, admitted through Sergeant McCarty's testimony, violated clearly established Supreme Court precedent as articulated in *Bruton v. United States,* 391 U.S. 123 (1968), even though stipulated to by the defense counsel at trial. Pasley additionally contends that the trial judge's refusal to allow him to cross-examine Carlton O'Neal, the prosecution's witness, about his probationary status in order to reveal bias, violated clearly established Supreme Court precedent as articulated in *Davis v. Alaska,* 415 U.S. 308, 316 (1974). The government argues that even if the trial judge's determinations resulted in a violation of clearly established federal law, any resulting error was harmless.

It is settled that Confrontation Clause violations are subject to harmless error review. *See Chapman v. California,* 386 U.S. 18, 23 (1967); *Bulls v. Jones,* 274 F.3d 329, 334 (6th Cir. 2001). However, we use a different standard

when reviewing state court decisions for harmless error in a collateral appeal than we do on direct appeal. In applying the harmless error analysis on habeas review for cases governed by AEDPA, we apply the harmless error standard set out in *Brecht v. Abrahamson,* 507 U.S. 619, 637 (1993) (holding that the *Chapman* harmless error standard, which requires the court to ask if absent the improperly admitted evidence, it is clear beyond a reasonable doubt that the jury would have returned a verdict of guilty, was not appropriate when reviewing habeas petitions, and replacing it with the lesser harmless-error standard articulated in *Kotteakos v. United States,* 328 U.S. 750, 776 (1946)); *Mitzel v. Tate,* 267 F.3d 524, 534 (6th Cir. 2001). Furthermore, we apply this standard even when the "federal habeas court is the first to review for harmless error," as in this case. *Gilliam v. Mitchell,* 179 F.3d 990, 995 (6th Cir. 1999).

Under the *Brecht* standard, a habeas petitioner must establish that the trial error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht,* 507 U.S. at 637 (quoting *Kotteakos,* 328 U.S. at 776). To meet this standard there must be more than a "reasonable possibility" that the error contributed to the jury's verdict. *Ibid.* Ultimately, "we must ask whether the error had 'a harmful or injurious effect on the fundamental fairness of the trial.'" *Mitzel,* 267 F.3d at 534 (quoting *Gilliam,* 179 F.3d at 995).

Having carefully considered the record on appeal, the parties' briefs, and the applicable law, we are not persuaded that the district court erred in holding that any errors present in Pasley's case did not have a harmful or injurious effect on the fundamental fairness of his trial. The district court opinion ably articulated the existence of

strong evidence, untainted by the Sixth Amendment violations at trial, that supports the jury's verdict. Gibson testified that Denard got into a car with Higgins and Pasley, thereby supplying the critical identification of Pasley as the other occupant of the car. Jones testified that Denard got into a car that evening with Higgins, who was driving, and another man, although Jones couldn't identify the other man. Jones essentially corroborated Gibson's testimony, apart from her identification of Pasley. And finally, Denard told Jones. Holman (the first officer on the scene), and his aunt, that Darrin Higgins and Higgins's friend shot him not long after Denard got into the car with Higgins and Pasley.

Gibson's identification of Pasley, rather than Higgins's description of Pasley, is the crucial evidence, since Higgins could have had an ulterior motive for giving a description of Pasley when being interrogated by the police, even if he gave no further information. As a result, it is likely that the jury relied on Gibson's testimony, rather than Sgt. McCarty's testimony as to Higgins's description, in their deliberations. Furthermore, with respect to O'Neal's testimony, although the trial court's exclusion of his probationary status was erroneous under *Alaska v. Davis,* we conclude that the trial error in this case did not have a substantial and injurious effect or influence on the jury's verdict in light of other evidence presented.

Pasley argues on appeal that Gibson's and Jones's testimony was highly unreliable, and could not, therefore, be counted upon to uphold the jury's verdict on a theory of harmless error. Furthermore, Pasley contends that without O'Neal's testimony, there was no evidence of first-degree murder, which requires a showing of either premeditation or felony murder. Both arguments fail.

A. Gibson's Testimony:

Earline Gibson gave a statement to the police approximately one month after Denard's shooting, and at that time she identified Pasley from a series of photographs the officers had brought with them. In her statement to the police. Gibson recalled that Denard had driven a blue car to the street where everyone was standing around on March 14, and had gotten into a brown car with Higgins and Pasley. Three days after making her statement. Gibson called the police and told them she had just had a dream about the events of that night and as a result, she remembered that Denard had actually driven up in a brown car, instead of a blue car, and that Higgins had been driving a blue car – not a brown one. At trial, Gibson's testimony was consistent with her post-dream revelation.

Gibson's prior inconsistent statements to the police were brought out in Gibson's testimony at trial, and while it is apparent that Gibson was not an ideal witness, her inconsistency on what color car was driven by whom is of minimal importance. In the first place, Jones and Shannon Guinn, another person who was standing around on the street that night, testified that Denard got into a blue car, thereby corroborating Gibson's testimony at trial regarding the color of the car. Second, the color of the car was not as important as Gibson's testimony identifying Pasley, of which she was confident throughout. Furthermore, Gibson's identification was all the more reliable because of her prior acquaintance with Pasley. Although any confusion in Gibson's testimony might weaken her overall credibility, she was firm with regard to her identification of Pasley. Given these facts, Gibson's testimony is not so unreliable as to weaken the evidence upon which the district court

and we rely in determining that the errors committed were in fact harmless.

B. Jones's Testimony:

Jones testified to the fact that on March 23, 1986, nine days after Denard was shot, he was visited by the police. Officer Stawiasz presented Jones with a photo array, in an attempt to identify the person who drove away with Higgins and Denard in the car. Pasley was the fifth photo in the array. Jones testified to the fact that he told the officers that he had not gotten a good look at the third man in the car, but thought it might be the third or fourth photo in the lineup. Jones did not select Pasley out of the photographs presented to him.

At trial, Jones again stated that he could not identify the person who was in the car with Higgins and Denard. While we absolutely agree that Jones's testimony cannot be relied upon for identifying Pasley as the third person in the car and the likely shooter of Denard, this is unnecessary, given Gibson's testimony. Jones's testimony corroborating Gibson's story that Denard got into a blue car driven by Higgins with another person riding as a passenger is all that is needed, and with regard to these facts, Jones remained consistent.

C. Premeditation

To convict Pasley of first-degree murder, the prosecution had to prove that Pasley had either committed murder "by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing"; or "in the perpetration of, or attempt to perpetrate, . . . robbery . . . " MCLA 750.316. The prosecution argued at trial that Pasley shot

Denard in the course of a drug deal that turned into an attempted armed robbery and murder. Pasley argued that he was not the third man in the car with Higgins and Denard, and was innocent. The jury found Pasley guilty of felony murder and felony firearm. Pasley now contends that without witness O'Neal's testimony, there was no evidence of first-degree murder, which requires a showing of either premeditation or felony murder.

Denard stated to both Jones and to his aunt that Higgins and his friend had tried to rob him. The jury apparently believed them and convicted Pasley. With the clear evidence of felony murder. it is unnecessary to demonstrate premeditation on Pasley's part. Thus O'Neal's testimony regarding Pasley's intent is not necessary to support Pasley's conviction.

IV

For the reasons given above, we AFFIRM the district court's decision to deny Pasley's petition for a writ of habeas corpus.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EVERETT PASLEY,

Petitioner,

v.

KENNY ROBINSON,

Respondent.
_____/

CASE NUMBER: 99-60755
HON. MARIANNE O. BATTANI

FINAL JUDGMENT

(Filed May 31, 2001)

The above entitled matter having come before the Court on a Petition for Writ of Habeas Corpus, Honorable Marianne O. Battani, United States District, presiding, and in accordance with the Memorandum Opinion and Order entered on May 31, 2001.

IT IS ORDERED AND ADJUDGED that the Petition for Writ of Habeas Corpus is DENIED.

Entered this 31st day of May, 2001, in Ann Arbor, Michigan.

/s/ Marianne O. Battani
MARIANNE O. BATTANI
UNITED STATES
DISTRICT JUDGE
(313) 224-5777

CERTIFICATE OF MAILING

I certify that a copy of this notice was mailed to Herbert Jordan ~~Everett Hesley~~ and Mary Morrow on this date by ordinary mail.

/s/ Mary Peters
Mary A. Peters, Case Manager for
Hon. Marianne O. Battani

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EVERETT PASLEY,

Petitioner,

v.

KENNY ROBINSON,

Respondent.

_____/

CIVIL ACTION NO.
99-CV-60755-AA
HONORABLE
MARIANNE O. BATTANI

OPINION AND ORDER DENYING HABEAS CORPUS PETITION AND GRANTING CERTIFICATE OF APPEALABILITY

(Filed May 31, 2001)

I. INTRODUCTION

Petitioner, Everett Pasley ("Pasley" or "petitioner"), by and through his attorney Herb Jordan, has filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 alleging that he has been convicted and sentenced in violation of his constitutional rights. Petitioner challenges his conviction after a jury trial of first degree felony murder, M.C.L. § 750.529, and felony firearm, M.C.L. § 750.227b. Petitioner was convicted after a joint trial with co-defendant Darrin Higgins in the Recorders Court for the City of Detroit held before separate juries.[1] Petitioner was sentenced to life imprisonment without possibility of

[1] Darrin Higgins was charged with felony murder and felony firearm. Higgins was acquitted of felony murder and convicted of felony firearm.

parole for felony murder and a consecutive two year sentence for felony firearm. For the reasons set forth below, the petition shall be denied.

II. STATEMENT OF FACTS

This action arises out of the shooting death of Troy Denard. Denard was shot at about 7:15 p.m. on March 14, 1986. The Michigan Court of Appeals summarized the evidence against petitioner as follows:

> Erline Gibson testified that she saw Denard enter a small blue car driven by defendant Higgins. Defendant Pasley had been in the passenger seat, but moved to the back when Denard got in. Gibson saw what appeared to be the handle of a gun when Pasley moved and opened his jacket.
>
> Kenneth Jones also saw Denard enter a small blue car driven by Higgins. Minutes later, Denard came back bleeding and asking for an ambulance because he had been shot. Jones testified that when he asked who shot him, Denard replied that Higgins and the other man tried to rob him and that both men shot him. Responding officer Randy Holman testified that Denard also told him that Higgins and another person who was in the back seat of the car shot him. Approximately one-half hour later, while in a hospital emergency room, Denard told his aunt [Paulette Moore] that Higgins and Higgins' friend shot him and were trying to rob him. Denard died of multiple gunshot wounds seven days later.

People v. Pasley, Michigan Court of Appeals Docket No. 97185 (August 9, 1988) at 1-2.

Carlton O'Neal also offered evidence against petitioner. O'Neal testified that a few days after the shooting, while at Darrin Higgins's house, he heard petitioner say that if Higgins had not helped Denard get out of the car, he (petitioner) would have killed Denard in the car. (Tr. Vol. IV at 54-56.) On cross-examination, defense counsel twice tried to question O'Neal about whether he was on probation. Each time, the prosecution's objection to questions about O'Neal's probationary status were sustained. Defense counsel was allowed to elicit an admission from O'Neal that he had been convicted of carrying a gun the year before. (Tr. Vol. IV at 58-59.)

A pathologist testified that Denard died of gunshot wounds to the head and left shoulder. Denard was shot twice in the head and once in the left shoulder area. Two bullets entered the back of Denard's head and traveled from the back of his head toward the front of his head. One of these two head-shot bullets entered the brain, one did not. single bullet entered the front of Denard's left shoulder area. This bullet passed from front to back and from left to right and upward, entering Denard's neck and throat and lodging in his left sinus bone. Although Denard was shot twice in the head, no evidence of close-range firing, such as soot or gunpowder, was found on or in Denard's skin, suggesting that he might have been shot from a distance of more than eighteen inches away.[2]

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[2] However, as the prosecutor pointed out in his rebuttal argument, Troy Denard did not die until seven days after the shooting. Further, surgery was performed on Denard before he died. Consequently, the autopsy was not performed until March 21, 1986, seven days after the

(Continued on following page)

Petitioner testified on his own behalf. Petitioner denied involvement in the shooting of Denard. Petitioner said he went to Ann Arbor with Sandra St. Clair the day Denard was shot to apply for a job with the Ann Arbor Police Department. Petitioner and St. Clair returned to Detroit at about 5:30 or 6:00 p.m. Sandra St. Clair was Darrin Higgins's sister. Petitioner testified that he was sleeping at Sandra St. Clair's mother's house on Inverness near where Denard was shot until about 8:00 p.m., when he received a call from Higgins. Petitioner stated that he saw Mary Higgins, Tony Higgins, and St. Clair as he left St. Clair's mother's house.

Petitioner stated that he drove his car and went to a motel where he saw Higgins and O'Neal. Petitioner registered a room in his name, because Higgins and O'Neal did not have their driver's licenses with them. Petitioner then left the motel and returned to the Inverness house where he saw St. Clair again.[3]

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shooting. These facts might affect the significance of the absence of evidence of close range firing on or in the skin.

[3] After the defense had rested in petitioner's case and petitioner's jury had been excused, Darrin Higgins testified on his own behalf. Darrin Higgins testified that he saw petitioner at the house on Inverness at about 6:30 or 7:00 p.m. the evening of the shooting. Darrin Higgins also lived at the Inverness house. According to Darrin Higgins, petitioner did not live there, but visited frequently, and stored a stereo there which he asked Darrin Higgins to sell for him. Darrin Higgins testified that he, Troy Denard, and petitioner drove together in Sandra St. Clair's blue Camaro to Denard's apartment, where Denard was to obtain cocaine to give petitioner for the stereo. Denard went inside for about fifteen seconds. Denard, Darrin Higgins, and petitioner then drove to Inverness in the blue Camaro. According to Darrin Higgins, while they were in the car together with petitioner sitting in the back seat and Denard sitting in the front passenger seat, petitioner shot at

(Continued on following page)

St. Clair testified that she was Higgins's sister and petitioner's girlfriend at the time of the shooting. She stated that she went with petitioner to Ann Arbor the day of the shooting to apply for a police job, returning to the house on Inverness with him at about 6:00 p.m. Shortly thereafter, she and petitioner laid down together and fell asleep. Petitioner left the house at about 7:30 or 7:45 p.m. that evening. St. Clair saw petitioner's car parked outside the Inverness house after petitioner was gone. Her blue Camaro was gone. Sometime before 10:00 p.m., petitioner drove her to the Crown Motel where she found her car. She was not certain what time it was when she found her car.

Petitioner did not call any witnesses to establish his whereabouts between the time he left the house on Inverness at about 7:30 or 7:45 p.m. and the time he picked up St. Clair there to drive her to the Crown Motel to recover her car.

Troy Denard four times, striking Denard in the head. Petitioner pointed the gun at Darrin Higgins and told him not to let Denard out of the car. Nonetheless, Darrin Higgins let Denard out of the car.

Darrin Higgins then drove to the Crown Motel on Woodward Avenue, at petitioner's request. Darrin Higgins testified that, after petitioner fell asleep, he took the gun from petitioner's coat pocket and called the police. Police officer Tommy Caroding testified that he answered a radio call and arrested Darrin Higgins who, at the time of his arrest had his hands in the air and pointed out the location of a snub nosed revolver on the ground nearby.

Darrin Higgins made a statement to police which was consistent with his testimony at trial. The statement was admitted and read into evidence by police officer Richard McCarty when petitioner's jury was not present.

The defense agreed to stipulate that if Sgt. Richard McCarty were called to testify at petitioner's trial he would testify that he arrested petitioner and that "the man he arrested fit the description given by Darrin Higgins of Mr. Pasley." (Tr. Vol. VI at 84.)

The prosecution argued that it was proven beyond a reasonable doubt that petitioner had shot Denard in a drug deal which turned into an attempted armed robbery and murder. The defense argued that the prosecution failed to prove beyond a reasonable doubt that petitioner was the third man in the blue Camaro with Higgins and Denard, that Gibson's identification of petitioner as the third man was unreliable, and that petitioner had not been involved in the shooting. After deliberating for about two hours, the jury found petitioner guilty of first degree felony murder and felony firearm.

Petitioner filed a direct appeal, presenting the following claims:

> I. Reversible error was committed when counsel was not present at a photographic identification display.
>
> II. The examining magistrate and the trial court erred in admitting the victim's statements as excited utterances, resulting in an improper denial of defendant's motion to quash the information and conviction of defendant when the properly admitted evidence was insufficient to support his conviction of felony murder.
>
> III. Defendant Pasley was denied the effective assistance of trial counsel.
>
> IV. The separate jury procedure denied petitioner a fair trial.

The Michigan Court of Appeals affirmed petitioner's convictions in a unpublished opinion. *People v. Pasley,* Michigan Court of Appeals No. 97185 (August 9, 1988). Petitioner did not file for leave to appeal in the Michigan Supreme Court.

On or about October 16, 1996, petitioner filed a motion for relief from judgment in the trial court raising the following claims:

> I. Petitioner Pasley was denied his state and federal constitutional right to due process and to confront the witnesses against him where, through stipulation, the highly prejudicial statement of a non-testifying co-defendant which identified defendant as his accomplice was introduced against defendant.
>
> II. Defendant was denied his state and federal right to effective assistance of counsel where trial counsel stipulated to the introduction of the incriminating statements of a non-testifying co-defendant which provided the critical but unreliable link in the prosecutor's attempt to prove defendant's participation in the offense.
>
> III. Defendant was denied his state and federal constitutional right of confrontation when the trial judge refused to permit trial counsel to explore the effect of a pivotal prosecution witness's probationary status on his mid-trial announcement that defendant confessed to the crime.
>
> IV. Defendant was denied his state and federal constitutional right to due process and to the assistance of counsel where the police conducted a pretrial photographic lineup in the absence of counsel.

> V. Defendant was denied his state and federal right to due process and the trial court failed in its duty to control the proceedings where after numerous indications from jurors and personnel present in the courtroom the court made an inquiry of only the Higgins jury regarding whether the conditions interfered with their ability to hear the evidence.
>
> VI. The prosecutor's misuse of the deceased's father's ambiguous conduct to wrongly impute to the deceased an identification of the defendant violates defendant's state and federal right to fundamental fairness and as a matter of due process requires reversal.

The trial court denied the motion, stating that "all of the issues raised by this Motion were considered on appeal." *People v. Pasley,* Recorder's Court for the City of Detroit Case No. 86-003155-02 (March 5, 1996). The Michigan Court of Appeals denied petitioner's delayed application for leave to appeal "for failure to meet the burden of establishing entitlement to relief under M.C.R. 6.508(D)." *People v. Pasley,* Michigan Court of Appeals Docket No. 196626 (March 25, 1997). The Michigan Supreme Court denied petitioner's delayed application for leave to appeal, "because the defendant has failed to meet the burden of establishing entitlement to relief under M.C.R. 6.508(D)." *People v. Pasley*, Michigan Supreme Court Docket No. 109568 (April 27, 1998).

Thereafter, on or about April 23, 1999, petitioner, through counsel, filed the instant petition for a writ of habeas corpus presenting the same six claims raised in his motion for relief from judgment.

III. STANDARD OF HABEAS REVIEW

The provisions of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996) ("AEDPA" or "the Act"), govern this case because petitioner filed his habeas corpus petition after the effective date of the Act. *Lindh v. Murphy*, 520 U.S. 321 (1997).

The AEDPA altered the standard of review that a federal court must use when reviewing applications for writs of habeas corpus.

As amended, 28 U.S.C. § 2254(d) provides that:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim:
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

The United States Supreme Court has recently addressed the question of the proper interpretation of the amendments to the habeas corpus statute concerning entitlement to relief. The Supreme Court has stated that "[i]n sum, § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to

claims adjudicated on the merits in state court." *Williams v. Taylor*, 120 S.Ct. 1495, 1523 (2000). The Supreme Court summarized the standard of review as follows:

> Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied – the state-court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 120 S.Ct. at 1523.

"[A] federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Williams*, 120 S.Ct. at 1521. The reviewing court should not inquire whether all reasonable jurists would agree that the state court's decision was reasonable or unreasonable. The reviewing court must be aware that "an unreasonable application of federal law is different from an incorrect application of federal law."

Williams, 120 S.Ct. at 1522. However, a postulated complete unanimity of the entire federal judiciary that a state court decision is unreasonable is not required before the reviewing court may conclude that the decision in question includes at least one dispositive unreasonable application of clearly established federal law.

"[A] state court's application of federal law is unreasonable and a writ may issue only if reasonable jurists would find it so arbitrary, unsupported or offensive to existing precedent as to fall outside the realm of plausible, credible outcomes." *Barker*, 199 F.3d at 871. Where constitutional trial error has been shown and the reviewing court, applying the standard in *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993), concludes that the error had a substantial and injurious effect or influence in determining the jury's verdict, a state court ruling finding such error harmless beyond a reasonable doubt is outside the realm of plausible, credible outcomes and the petitioner is entitled to habeas relief. *Barker v. Yukins*, 199 F.3d 867 (6th Cir. 1999), *cert. denied*, 120 S.Ct. 2658 (2000). However, "[w]hen a habeas court is in grave doubt as to the harmlessness of an error that affects substantial rights, it should grant relief." *O'Neal v. McAninch*, 513 U.S. 432, 445 (1995).

The federal court reviewing a habeas petition must apply the presumption of correctness to state court findings of fact. 28 U.S.C. § 2254(d); *West v. Seabold*, 73 F.3d 81, 83 (6th Cir. 1996), *cert den.* 518 U.S. 1027 (1996); *Lundy v. Campbell*, 888 F.2d 467, 469 (6th Cir. 1989), *cert. denied*, 495 U.S. 950 (1990). This presumption may only be overcome by the presentation of clear and convincing evidence by the petitioner. 28 U.S.C. § 2254(e)(1).

IV. ANALYSIS

A. 6th Amendment Right of Confrontation as to Non-Testifying Co-Defendant

Petitioner claims that his right of confrontation was violated by the stipulation that the man Sgt. McCarty "arrested fit the description given by Darrin Higgins of Mr. Pasley." (Tr. Vol. VI at 84.) Petitioner argues that this evidence of Higgins's description of him to Sgt. McCarty constituted an implicit statement by Higgins that petitioner was the third man in the blue Camaro and that petitioner had shot Denard. Higgins did not testify before petitioner's jury. Therefore, he was not available for cross-examination regarding statements attributed to him by Sgt. McCarty. Petitioner contends that, consequently, admission of evidence that Sgt. McCarty arrested him after receiving a description of him from co-defendant Higgins violated his right of confrontation under *Bruton v. United States*, 391 U.S. 123 (1968) and its progeny.

1. Procedural Default Doctrine

Petitioner did not object at trial to admission of the evidence that Sgt. McCarty arrested him after receiving a description from Higgins. On the contrary, it was admitted by stipulation. Respondent contends that petitioner thereby defaulted this claim. However, this Court is not persuaded that petitioner has procedurally defaulted this claim.

Under the procedural default doctrine, a federal habeas court will not review a question of federal law if the state court's decision rests on a substantive or procedural state law ground that is independent of the federal

question and is adequate to support the judgment. *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). As the Supreme Court has explained, an adequate and independent finding of procedural default will bar federal habeas review of the federal claim, unless the habeas petitioner can show "cause" for the default and "prejudice attributable thereto," or demonstrate that failure to consider the federal claim will result in a "fundamental miscarriage of justice." *Harris v. Reed*, 489 U.S. 255, 262 (1989) (citations omitted); see also, *Coleman*, 501 U.S. at 729-30 (The procedural default doctrine "bar[s] federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement.").

However, "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on the procedural bar." *Harris*, 489 U.S. at 263. Furthermore, "only a 'firmly established and regularly followed state practice' may be interposed by a State to prevent subsequent review . . . of a federal constitutional claim." *Ford v. Georgia*, 498 U.S. 411, 423-240 [sic] (1991) (quoting *James v. Kentucky*, 466 U.S. 341, 348-51); *see also, Calderon v. United States Dist. Ct. for the E. Dist. of Cal.*, 96 F.3d 1126, 1129 (9th Cir. 1996) (internal quotation omitted) ("For the procedural default doctrine to apply, a state rule must be clear, consistently applied, and well-established at the time of the petitioner's purported default.").

If the last state court judgment is an unreasoned order simply affirming, in a formulary sense, the conviction, the federal court should look through the last order and examine the preceding reasoned order. If that opinion explicitly relies on the procedural default, it should be presumed that the last state court judgment likewise relied on the bar. *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991); *Rust v. Zent*, 17 F.3d 155, 161 (6th Cir. 1994); *Couch v. Jabe*, 951 F.2d 94, 96 (6th Cir. 1991) (*per curiam*).

Before considering whether any of petitioner's claims are barred by a procedural default, two preliminary issues must be addressed. As noted above, there are two prerequisites to concluding that a federal habeas claim is barred by a procedural default in the state courts: (1) a firmly established and regularly followed procedural rule; and (2) a clear and express reliance upon the procedural rule by the state court. Thus, the Court must consider whether any of the various state court decisions on petitioner's motion for relief from judgment meet these two prerequisites. Generally speaking, for purposes of this analysis, the state courts' orders can be broken down into two categories: (1) the appellate court orders denying petitioner's applications for leave to appeal and (2) the trial court's order denying petitioner's motion for relief from judgment

2. Appellate Courts' Denials of Leave to Appeal

This Court concludes that the appellate courts' denials of petitioner's various applications for leave to appeal are simply unreasoned orders affirming the trial court's order, and thus do not establish a procedural default under *Ylst*. As discussed above, with respect to each application for

leave to appeal, the court of appeals and supreme court denied petitioner's applications because petitioner "failed to meet the burden of establishing entitlement to relief under MCR 6.508(D)." However, as discussed above, if the last state court judgment is an unreasoned order simply affirming, in a formulary sense, the conviction, the federal court should look through the last order and examine the preceding reasoned order – i.e., the trial court's order. See *Ylst*, 501 U.S. at 803; *Rust*, 17 F.3d at 161; *Couch*, 951 F.2d at 96. As the Supreme Court explained in *Ylst*, this presumption is based on "[t]he maxim . . . that silence implies consent, not the opposite – and courts generally behave accordingly, affirming without further discussion when they agree, not when they disagree, with the reasons given below." *Ylst*, 501 U.S. at 804, 111 S.Ct. 2590.

Contrary to respondent's assertion, neither the Michigan Supreme Court nor the Michigan Court of Appeals clearly and expressly relied on a procedural bar. These courts merely stated that the petitioner had failed to establish entitlement to relief under MCR 6.508(D). Without any explanation of the matter, this could mean either that petitioner failed to meet the procedural requirements of the rule, or that he had not substantively established entitlement to relief. Without more, this language is insufficient to constitute a reasoned opinion on the matter, and the Court must therefore look to the trial court's opinion denying petitioner's motion for relief from judgment. See, e.g., *Mallory v. Overton*, 45 F.3d 430, 1994 WL 722833, at *2 (6th Cir.1994) (unpublished) (looking to the trial court's opinion to determine whether petitioner procedurally defaulted where Michigan Supreme Court used language denying leave to appeal nearly identical to that used here); *Grant v. Rivers*, 920 F.Supp. 769, 781

(E.D.Mich.1996) (Gadola, J.) (where Michigan Court of Appeals and Michigan Supreme Court denied leave to appeal in standard, one-sentence orders substantially the same as the orders in this case, trial court's opinion denying motion for relief from judgment was last reasoned order on the matter); *Thompson v. Elo*, 919 F.Supp. 1077, 1083 (E.D.Mich.1996) (O'Meara, J.) (same), overruled on other grounds, *Rogers v. Howes*, 144 F.3d 990, 994 n. 5 (6th Cir.1998). Accordingly, the Court must look to the trial court's order denying petitioner's motion to determine whether the state court's relied upon a procedural bar.

3. Trial Court's Ruling on Petitioner's Motion

In ruling on petitioner's motion for relief from judgment, the trial court denied the motion because "all of the issues raised by this Motion were considered on appeal." *People v. Pasley*, Recorder's Court for the City of Detroit Case No. 86-003155-02 (March 5, 1996). Examination of the briefs from petitioner's appeal of right and his motion for relief from judgment indicates that the trial court's order denying the motion because all of the issues were considered on appeal was entered in error, as the motion raised new issues. Nonetheless, the trial court's order cannot be considered to establish a procedural default, because it does not rely on a procedural default rule.

Furthermore, if the trial court had found that petitioner's claims were barred because he failed to establish good cause for failing to raise the claims on direct appeal, this still would not establish a procedural default in the present case. While such a statement would be sufficient to constitute a clear and express reliance on the procedural bar of MCR 6.508(D)(3), such a ruling on the motion

would not constitute a procedural default for federal habeas purposes in this case because, at the time of petitioner's purported default – i.e., when he failed to raise these claims on direct appeal in 1987 – MCR 6.508 was not a firmly established and regularly followed procedural rule.

In relevant part, Rule 6.508 provides that a trial court may not grant a motion for relief from judgment if the motion "alleges grounds for relief . . . which could have been raised on appeal from the conviction and sentence or in a prior motion [for relief from judgment]." M.C.R. 6.508(D)(3). However, this rule was enacted in 1989. Thus, at the time of petitioner's direct appeal in 1987 – that is, when petitioner filed his appeal of right and failed to include these claims – Rule 6.508 was not firmly established and regularly followed. See *Rogers v. Howes*, 144 F.3d 990, 993-95 (6th Cir.1998); *Davey v. Stegall*, 103 F.3d 129, 1996 WL 708336, at *1 (6th Cir.1996) (unpublished order); *Tibbs v. Lecureux*, 89 F.3d 835, 1996 WL 306532, at *2 (6th Cir.1996) (unpublished order); *Doucet v. Lecureux*, 72 F.3d 130, 1995 WL 723185, at *1 (6th Cir.1995) (unpublished order). Accordingly, the trial court's denial of petitioner's motion for relief from judgment, to the extent that it relies on Rule 6.508 and not some other procedural default (e.g., failure to object at trial), does not bar petitioner's claims. See *Jones v. Toombs*, 125 F.3d 945, 947 (6th Cir.1997) (MCR 6.508(D)(3) is an adequate, independent state rule barring habeas review as applied to defaults occurring after the rule's enactment).

To summarize: the appellate courts' denials of petitioner's applications for leave to appeal are not reasoned opinions, and thus irrelevant to the procedural default inquiry. Thus, the Court must examine the trial court's

opinion rejecting petitioner's motion for relief from judgment to determine whether the trial court clearly and expressly relied upon a procedural rule in denying petitioner's claims. This Court finds that the trial court did not clearly and expressly rely upon a procedural rule in denying petitioner's claims. Moreover, to the extent that any such reliance is based on petitioner's failure to raise his claims in his appeal of right, petitioner's claims are not barred here, because this procedural rule was not enacted until 1989, after petitioner's appeal of right had been filed and decided.

This Court concludes that petitioner's claims raised in his motion for relief from judgment and in the present habeas petition are not barred by any procedural default in the state courts.[4] Accordingly, the Court shall examine the merits of petitioner's challenge to the admission of the aforementioned stipulation.

4. Review of Alleged Error

Because there appears to be no state court decision articulating its reasons for denying petitioner's claims on the merits to evaluate under § 2254(d), this court must conduct an independent review of the record and determine whether the state court decision is contrary to

[4] Moreover, if failure to object to admission of the evidence constituted ineffective assistance of counsel and failure to raise this issue on appeal was ineffective assistance of appellate counsel, and admission of this evidence prejudiced petitioner's trial, these procedural defaults may be excused. *Washington v. Hofbauer*, 228 F.3d 689, 708-09 (6th Cir.2000); *Martin v. Jabe*, 747 F.Supp. 1227, 1229 (E.D.Mich. 1989).

federal law, unreasonably applies clearly established law, or is based on an unreasonable determination of the facts in light of the evidence. *Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir.2000), *petition for cert. applied for*, (October 2, 2000). This "independent review, however, is not a full de novo review of the claims, but remains deferential because the court cannot grant relief unless the state court's result is not in keeping with the strictures of the AEDPA." *Harris*, 212 F.3d at 943.

5. The *Bruton* Rule

A criminal defendant's right to confront the witnesses against him includes the right not to have the incriminating hearsay statement of a nontestifying codefendant admitted in evidence against him. The confession of a nontestifying codefendant is admissible only against himself and only if it does not implicate his codefendants. *Bruton*, 391 U.S. at 137. In *Bruton*, the United States Supreme Court held that a defendant's rights are violated "under the Confrontation Clause when his nontestifying codefendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant." *Richardson v. Marsh*, 481 U.S. 200, 201 (1987). In *Bruton*, the nontestifying codefendant's confession expressly implicated the defendant as his accomplice. Therefore, there was no doubt that the confession was "powerfully incriminating" evidence of the defendant's guilt. *Richardson*, 481 U.S. at 208 (quoting *Bruton*, 391 U.S. at 135).

In the present case petitioner was initially arrested by Sgt. McCarty on March 15, 1986, the morning after

Denard's shooting.[5] At trial, it was stipulated that petitioner's codefendant Higgins provided Sgt. McCarty with the description of petitioner which led to his initial arrest. In final argument, the prosecutor carefully explained the connection between Denard's shooting, Higgins's arrest, and petitioner's initial arrest. The prosecutor first stated that Troy Denard was shot at about 7:15 or 7:30 p.m. on a Friday night. The prosecutor continued that Darrin Higgins was arrested at about 4:00 a.m. the next morning. Evidence had been presented that the murder weapon was found near where Darrin Higgins was arrested and that Higgins was the only person besides the officers present at that time. (Tr. Vol. IV at 136.) The prosecutor completed this chain of evidence by stating in closing argument:

> Somewhere around four o'clock we have officers arresting Darrin Higgins. And, at the time Darrin Higgins is arrested they confiscate a gun, a gun that is matched up to the bullets that were found in Troy Denard's hair [sic] about four o'clock. And then we have testimony that . . . Higgins was taken to the 12th Precinct and that Sgt. McCarty was from the 12th Precinct detective.
>
> And then we have testimony that Sgt. McCarty goes out looking for a man that was described by Higgins and gets him at six o'clock in the . . . Crown Motel and that man is Pasley. The description of Pasley at that time was furnished by Higgins. The description on which McCarty

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[5] Petitioner was subsequently released without being charged but was rearrested and charged with felony murder after Denard's death.

> was relying was furnished by Higgins who knew him.

(Tr. Vol. VII at 53-54.) It is clear that the statement stipulated to by defense counsel contained within it an implicit accusation of guilt made by Higgins against petitioner.

In a case directly on point here, the Second Circuit in *Mason v. Scully*, 16 F.3d 38, 42 (2d Cir. 1994), held that: "To implicate the defendant's confrontation right, the statement need not have accused the defendant explicitly but may contain an accusation that is only implicit." The *Mason* court found *Bruton* error where a police officer was allowed to testify that defendant Mason became a suspect only after a conversation with nontestifying codefendant Rivera. The court noted that "there was no police work that turned up Mason, and the only lead to him obviously came from [police officer] Fuhr's conversation with Rivera." *Id.* at 44. The court found that "[t]he fact that the content of Rivera's statement to Fuhr was not revealed in detail was immaterial, for the plain implication that the prosecutor sought to elicit, and emphasized in his summation, was that the conversation with Rivera led the police to focus on Mason." *Id.* at 43. The court held that admission of this evidence was a violation of the 6th Amendment.

In the present case, it is clear from the evidence and the prosecutor's argument that petitioner first became a suspect or a focus of the investigation because of information provided by Higgins, including Higgins's description of him. Moreover, it is clear that the prosecutor emphasized this fact in his final argument. Petitioner was arrested by Sgt. McCarty only two hours after Higgins

gave a description of petitioner to him. Higgins was identified by Denard himself as one of the two men who shot him, through the testimony of Paulette Moore and Officer Randy Holman. The plain implication of the stipulation that Higgins provided the description of petitioner which resulted in his arrest was that Higgins had identified petitioner as the man in the back seat who shot Denard.

Respondent relies on a Fifth Circuit case, *Foy v. Donnelly*, 959 F.2d 1307 (5th Cir. 1992), to argue that admission of the stipulation was not *Bruton* error. This Court finds *Foy* factually distinguishable. In *Foy*, a police officer was allowed to testify that defendant Foy's codefendant Shelbia had given a confession and that an arrest warrant for Foy was prepared after the officer's investigation and taking of this statement. The Fifth Circuit noted that because there was much other evidence connecting Foy to the crime, including eyewitness identification by another police officer who had witnessed part of the crime, there was no necessary inference that it was Shelbia's that [sic] statement had implicated Foy.

That is not the case here. At the time petitioner was first arrested, the only identification the police had of the third man in the car was Higgins' identification of petitioner. The police had not yet spoken to Gibson, and would not do so until April 14, 1986, after petitioner had been released from custody and after Denard had died. Further, the information concerning petitioner's alleged confession was not provided to the police prior to petitioner's initial arrest. Rather, O'Neal's assertion that petitioner had confessed to shooting Denard first emerged at trial. Indeed, O'Neal testified that petitioner's purported confession did not occur until after he had been initially arrested

and released. Under these circumstances, the stipulation that Sgt. McCarty arrested petitioner after getting a description of him from Higgins constitutes an implicit accusation of guilt by petitioner's nontestifying codefendant Higgins.

It is "obviously improper to create in jurors' minds the impression that a codefendant's unreported statement led to the defendant's arrest." *Mason*, 16 F.3d at 43 (internal quotation omitted). Yet that is precisely what happened in the present case. No verbal statements attributed to Higgins explicitly incriminating petitioner were put before petitioner's jury. Nonetheless, the evidence that, upon his arrest near the murder weapon, Higgins described and identified petitioner who was found and arrested two hours later, solely on his co-defendant's identification, constituted incriminating evidence that Higgins had told police that petitioner was Denard's killer. The clear implication of the evidence was that Higgins had incriminated petitioner. This evidence was the functional equivalent of quoting Higgins as saying "Everett Pasley shot Troy Denard."

This Court concludes that the admission of evidence that petitioner was arrested by Sgt. McCarty after being given a description of him by his nontestifying codefendant Higgins, and when no other identification of petitioner or means of connecting petitioner with the crime was available, together with the prosecutor's argument linking this evidence with other trial evidence and emphasizing the implication that Higgins had identified petitioner, violated petitioner's right of confrontation as established by the United States Supreme Court in *Bruton*.

B. 6th Amendment Right of Confrontation as to Witness Carlton O'Neal

Petitioner contends that his right of confrontation was violated when the trial judge refused to allow defense counsel to question witness O'Neal about his probationary status. When defense counsel asked O'Neal twice whether he was on probation, the trial judge sustained the prosecutor's objections to this question on both occasions. The trial judge did allow defense counsel to ask O'Neal if he had been arrested and convicted for an offense. O'Neal replied that he had been convicted of carrying a gun the previous year. Defense counsel also asked O'Neal whether the police had pressured him to testify. O'Neal said they had not. Defense counsel also elicited admissions from O'Neal that he was engaged to codefendant Higgins's sister, that he was living with Higgins's mother and his fiancee, and that Higgins's mother drove him to court. (Tr. Vol. IV at 60, 66.)

The Sixth Amendment to the United States Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." U.S. Const. Amend. VI (1965). A primary right secured by the Sixth Amendment is the right of cross-examination: "The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination*." *Davis v. Alaska*, 94 S.Ct. 1105, 1110 (1974) (emphasis in original) [citation omitted]. The Court distinguished between cross-examination where the purpose was 1) a general attack on a witness' credibility, or 2) a particular attack on a witness' credibility "effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the

witness as they may relate directly to issues or personalities in the case at hand." *Id.* at 1110. This second, more particular type of evidence is "always relevant" in discrediting witnesses and affecting the weight of their testimony. *Id.* at 1111. Exclusion of such evidence is always constitutional error. *See also Boggs v. Collins*, 226 F.3d 728, 740 (6th Cir. 2000) (holding that the Sixth Amendment "compels cross-examination if that examination aims to reveal the motive, bias, or prejudice of a witness/accuser.")

The Supreme Court has emphasized that "'the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross examination.'" *Van Arsdall* at 678-79, *quoting Davis*, 415 U.S. at 316-17. The *Van Arsdell* Court then elaborated that "a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness." *Van Arsdall* at 680.

In the instant case, petitioner was allowed to inquire whether O'Neal had any prior convictions and elicited an admission that O'Neal [sic] been convicted during the prior year for carrying a gun. O'Neal denied being pressured by police in giving his testimony. However, defense counsel was not allowed to ask O'Neal about whether he was on probation, despite informing the trial judge that this inquiry "goes to his motivation and fear of what will happen to him if he doesn't cooperate with the police." (Tr. Vol. IV at 58.) Thus, the defense was allowed to make the more general inquiry about whether O'Neal had any prior convictions, but not allowed to make the more pointed, specific inquiry into whether he was on probation, and

whether his vulnerable status as a probationer made him susceptible to undue pressure.

Davis is particularly applicable here. In *Davis*, the Supreme Court considered whether the Confrontation Clause protected the defendant's right to cross-examine a key prosecution witness about his probationary status as a juvenile delinquent. The witness, called by the prosecution in Davis's grand larceny and burglary trial, testified that he saw two men standing next to a car in which a stolen safe was found. *Id.* at 309-10. The defendant sought to introduce the witness's probationary status as evidence of his possible bias. The defense hoped to argue that the witness acted hastily in implicating the defendant either to shift suspicion away from himself, or because he was subjected to pressure from police for fear that his probation would be revoked. *Id.* at 311. The prosecution argued that its interest in preserving the confidentiality of juvenile delinquency adjudications outweighed the defendant's interest. *Id.* at 318-19.

The Supreme Court first observed that one of the primary purposes of cross-examination is to reveal "possible biases, prejudices, or ulterior motives." *Id.* at 316. The Supreme Court concluded that the jurors were entitled to hear the defense theory which sought to create "an inference of undue pressure because of [the witness'] vulnerable status as a probationer, as well of [the witness'] possible concern that he might be a suspect in the investigation." *Id.* at 318 (citation and footnote omitted). The Court held that this interest, protected by the Confrontation Clause, outweighed the state's interest in maintaining confidentiality of juvenile records. Thus, "the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to

the weight to place on [the witness'] testimony, which provided 'a crucial link in the proof . . . of petitioner's act.'" *Davis v. Alaska, supra*, at 317.

In light of *Davis*, this Court concludes that the trial judge's refusal to permit inquiry into Carlton O'Neal's probationary status was a violation of his Sixth Amendment right of confrontation. The trial court prevented defense counsel from developing a theory that O'Neal may have been biased due to his possible probationary status, either because the State of Michigan placed him under undue pressure or because he shaped his testimony to curry favor with the State.

This Court recognizes that the defense was able to elicit admissions that O'Neal had been convicted of a gun charge the prior year and that O'Neal was engaged to Higgins's sister and lived with Higgins. (Tr. Vol. III at 60-74). However, this cross-examination and its potential usefulness does not excuse the improper refusal to allow inquiry into O'Neal's probationary status. There is a great difference between the status of someone who has been convicted of a crime and has fully served his or her sentence (or paid his or her fine) and someone who is on probation. Probation is a form of state custody. A probationer may be sent to prison, or have a conviction become final instead of taken under advisement and eventually dismissed, or otherwise have his or her criminal sanctions increased in severity if his or her probation is revoked. Being on probation may subject a witness to pressure from the State which having a prior conviction does not.

This Court concludes that the trial court's exclusion of that testimony was a violation of petitioner's 6th Amendment right of confrontation.

C. The *Brecht* Harmless Error Standard

Finding constitutional violations does not end the court's inquiry. Rather, the court must determine the harmlessness, or not, of the error. The standard for determining whether habeas relief should be granted is whether the constitutional error "had a substantial and injurious or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). This standard was applied to Sixth Amendment Confrontation Clause questions by the Sixth Circuit in *Gilliam v. Mitchell,* 179 F.3d 990 (6th Cir. 1999). In *Gilliam*, petitioner was convicted of armed robbery. He petitioned for a writ of habeas corpus asserting that his Sixth Amendment Confrontation Clause right was denied when the court admitted the taped confession of a non-testifying co-defendant which implicated petitioner in the robbery. Applying the *Brecht* standard, the Sixth Circuit Court of appeals held that even if admission of the statement was error, it "did not have a 'harmful or injurious effect' on the fundamental fairness of the trial." *Gilliam*, 179 F.3d at 995. The court relied on corroborating evidence, stating that:

> As the government points out, other evidence corroborates the conclusions drawn from Moore's [the co-defendant's] statement. A witness who lived close to the store testified that she saw two males laughing and running to Moore's vehicle; Moore then asked, "How much did you get?" Petitioner admitted that he drove to the store with [the two co-defendants] and that he left in Moore's car.

Id. On these facts, the court found the error to be harmless. *Id.*

In the present case, there is no physical evidence linking petitioner to the shooting. Although the murder weapon was recovered by police, no evidence was presented that petitioner's fingerprints were on it. Petitioner's codefendant Darrin Higgins was the only person in the vicinity of the gun when it was found by police. No other evidence connected petitioner to the gun.

Carlton O'Neal, testified that petitioner told him that petitioner "would have killed him [Denard] in the car if Darrin hadn't helped him get out." (Tr. Vol. IV at 55.) Higgins's statement, admitted through McCarty, links petitioner to the shooting itself and clearly implies that it was petitioner who shot Denard. These two pieces of evidence lead to the conclusion that petitioner was the third man in the car with Higgins and Denard and that he shot Denard.

However, other evidence corroborates the conclusions to be drawn from the O'Neal and Higgins evidence. Eyewitness testimony established the following facts: there were thee persons in the car, Denard, Higgins and a person in the back seat. The person in the back seat was identified as petitioner and was described as having a gun. Denard was shot by the person in the back seat shortly after the three men drove away in the car.

Two witnesses, Kenneth Jones and Shannon Guin, testified that they saw Denard, Higgins and another man, whom they could not identify and who was seated in the back seat, drive off in a car driven by Higgins. (Tr. Vol. IV at 145.) Jones further testified that a short time after the three men drove off Denard came running back down the street. *Id.* at 147. He was bleeding and calling for an

ambulance. Jones testified that Denard told him that Higgins and "that guy" had shot him. *Id.*

Gibson testified that she saw Higgins drive up in a blue car while she was talking to Denard. (Tr. Vol. II at 41.) A man sitting in the front seat of the car driven by Higgins got out and got into the back seat. *Id.* at 42. She saw that this man had a gun in the waistband of his pants. *Id.* at 43. She saw Denard enter the car and drive off with Higgins and the third man in the back seat. *Id.* Gibson later identified the third man as petitioner, first in a photo line-up after Denard's death and again at trial. Gibson further testified that she had been a neighbor of the Higginses, including Darrin Higgins, for many years and recognized Darrin Higgins because of this. Gibson testified that she had seen petitioner with Higgins on prior occasions. *Id.* at 42-43. This testimony indicates that petitioner was not a stranger to Gibson. Therefore, her identification testimony carried more weight than a stranger identification. Gibson's testimony places petitioner in the backseat of the car with Higgins and Denard just prior to the shooting. Gibson's testimony also establishes that petitioner had a gun at that time.

Officer Randy Holman testified that he took a statement from Denard shortly after the shooting. Officer Holman stated that when he asked Denard who had shot him, "he told me that Darrin had shot him and Darrin was in the car with an occupant in the back seat and that they both shot him." (Tr. Vol. IV at 91.)

Thus, while the jury could have drawn the conclusion that petitioner killed Denard from the testimony of O'Neal and the McCarty stipulation, they also could have drawn the same conclusion from other, untainted, evidence. And

it was this untainted evidence that the prosecution offered first in its closing argument. The prosecutor stated:

> I think [defense counsel] put his finger on what the real issue is in this case. He talked about the testimony of Earline Gibson and the fact that Earline Gibson was called first. She was called first for a specific reason, because that is the case against this man. Ladies and gentlemen, the evidence shows or the uncontradicted evidence shows that Troy Denard made it very clear that he was shot by Darrin Higgins and that man with him.
>
> "Darrin shot me; Darrin and that man shot me. They tried to rob me."
>
> The only issue for this Jury, ladies and gentlemen, is "who was that man with Darrin Higgins?" ... If, listening to the evidence, you believe that that man who was with Darrin Higgins when Troy Denard was robbed and shot was Mr. Pasley, find him guilty.
>
> * * *
>
> What evidence is there that Mr. Pasley was the person who was there in that car? That's what this trial is all about. That's what you have to decide. Earline Gibson right up front, without any monkey shines, without any long protracted drawn out matter, was called first because that's the real issue in this case.

(Tr. Vol. VII at 32-33.) Thus, each chain of evidence and inference, independently of the other, may lead a jury to the same conclusion: petitioner was the third man in the car who shot Troy Denard. And each chain of evidence and inference, independently of the other, was presented to the

jury on closing argument. In these circumstances, given the strength of other, untainted evidence, identifying petitioner as the third man in the car and the third man as the one who shot Denard, the court finds that presentation of O'Neal's testimony and the stipulation as to Sgt. McCarty's testimony to the jury did not have a substantial and injurious effect on the trial. *Gilliam* at 995. The Court finds that petitioner is not entitled to habeas relief on this claim.

D. Ineffective Assistance of Trial Counsel

Petitioner contends that he was denied the effective assistance of counsel by counsel's agreement to stipulate that if Sgt. Richard McCarty were called to testify, he would testify that he arrested petitioner Everett Pasley and "the man he arrested fit the description given by Darren Higgins of Mr. Pasley." Tr. Vol. VI at 84.

In order to establish ineffective assistance of counsel, petitioner must show that counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 691-92 (1984). First, petitioner must show that counsel's performance was deficient and "fell below an objective standard of reasonableness." *Id.* at 687-88. Petitioner must show that counsel's performance did "not meet the minimum standards of reasonable professional competence." *Lovett v. Foltz*, 687 F.Supp. 1126, 1137 (E.D. Mich. 1988).

Second, petitioner must show that counsel's deficient performance prejudiced the defense. This requires Petitioner to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable

probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The likelihood of a different result need only be reasonable. Petitioner "need not prove prejudice by a preponderance of the evidence." *Jemison v. Foltz*, 672 F.Supp. 1002, 1007 (E.D. Mich. 1987). The proper test for prejudice in an ineffective assistance case in which the defendant alleges the deprivation of a right to which the law entitles him is whether, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Williams v. Taylor*, 120 S.Ct. 1495, 1524 (2000) (O'Connor, J., concurring) (quoting *Strickland*, 466 U.S. at 694). In short, a successful ineffective assistance of trial counsel claim requires proof that counsel's performance was deficient and that counsel's error or "errors deprived [petitioner] of a fair trial." *Precin v. United States*, 23 F.3d 1215, 1218 (7th Cir. 1994).

This Court has found that neither of the constitutional errors had a substantial and injurious effect or influence on the jury's verdict. Thus, there is no reasonable probability that the outcome of his trial would have been different in that absence of the constitutional errors and petitioner was not deprived of a fair trial. This Court finds that petitioner is not entitle to habeas relief on this claim.

E. Lack of Counsel at a Photographic Display

Petitioner contends that he was denied due process when Gibson identified him at a photo display where he was not represented by counsel. Petitioner's claim that his uncounseled identification in an investigatory photo display held before his arrest and before the initiation of

criminal charges against him does not entitle him to habeas relief for several reasons.[6]

In *Kirby v. Illinois*, 406 U.S. 682, 689 (1972), the Supreme Court ruled that the right to counsel set forth in *United States v. Wade*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967) only applies to in-person identifications conducted "at or after the initiation of adversary judicial criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." This is the case because the initiation of such proceedings "marks the commencement of the 'criminal prosecution' to which alone the explicit guarantees of the Sixth Amendment are applicable." *Id.* at 690. Therefore, in *Kirby*, the Supreme Court held that the evidence of a robbery victim's one-on-one police station identification of an uncounseled suspect was constitutionally permitted, because adversary judicial criminal proceedings had not yet begun. Thus, petitioner did not have a federal constitutional right to counsel at the photo display because adversary criminal proceedings against him had not yet begun at the time of the photo display.

Furthermore, although the Sixth Amendment gives a criminal defendant the right to have counsel present at an in-person lineup after the initiation of criminal proceedings against him, there is no corresponding Sixth Amendment right to counsel during a photographic display. *United States v. Ash*, 413 U.S. 300, 321 (1973); *Mikel v.*

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[6] As discussed previously, petitioner was arrested the morning after the shooting. He was held for two or three days and released. Petitioner was not re-arrested until after he was identified in the photo display by Earline Gibson.

Thieret, 887 F.2d 733, 737 (7th Cir. 1989). Thus, petitioner had no federal constitutional right to counsel at the photo display because it was a photo display, not an in-person lineup.

This does not mean that Petitioner was without any constitutional protections during the photographic display. Petitioner did not have the right to counsel at the display. "In such cases, however, due process protects the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures." *Moore v. Illinois*, 434 U.S. 220, 227 (1977). However, Petitioner has not shown or alleged that the photographic display was unnecessarily suggestive. Petitioner has not shown that his federal constitutional rights were violated by the uncounseled photo display at which he was identified by Earline Gibson. Consequently, this claim does not entitle him to habeas relief. *United States v. Ash*, 413 U.S. at 321; *Estelle v. McGuire*, 502 U.S. 62, 67 (1991) (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). See also, *Pulley v. Harris*, 465 U.S. 37, 41 (1984) and *Floyd v. Alexander*, 148 F.3d 615, 619 (6th Cir.) (concluding that claimed violation of state law is not cognizable in federal habeas corpus proceedings), *cert. denied*, 525 U.S. 1025 (1998).

F. Alleged failure of the Trial Court to Control Courtroom Proceedings

Petitioner alleges that the trial court failed to control proceedings by failing to make inquiries sufficient to insure that jurors were able to hear the witnesses and other speakers during the trial. To support this claim, petitioner cites the example of a Darrin Higgins juror named Lawlor who informed the court she had been

unable to hear part of the proceedings. Juror Lawlor was removed from the Higgins jury after a lengthy inquiry by the trial court. Juror Lawlor also stated that other jurors had made comments indicating that they had difficulty hearing. Petitioner asserts that this shows that "the acoustic conditions had the potential of interfering with a jurors' ability to intelligently decide the case." Petitioner's Brief at 34.

Respondent contends that this claim was defaulted by failure to object at trial, was not presented to the state courts as a federal constitutional issue, and lacks merit. The exhaustion and procedural default issues surrounding this claim raise more questions than the claim on the merits. This Court may consider and deny a meritless claim despite the petitioner's failure to exhaust state court remedies. 28 U.S.C. § 2254(b)(2). This Court will therefore assume without deciding that there was no procedural default and decide the issue on the merits. *Binder v. Stegall*, 198 F.3d 177, 178 (6th Cir. 1999).

"The granting of a petition for a writ of habeas corpus relief pursuant to 28 U.S.C. § 2254 involves a determination that some right guaranteed petitioner by the Fourteenth Amendment to the United States Constitution was violated in the petitioner's state court proceedings." *Serra v. Michigan Department of Corrections*, 4 f.3d 1348, 1350 (6th Cir. 1993) (citing *Cupp v. Naughten*, 414 U.S. 141, 146 (1973). The burden of proof in a habeas corpus proceeding is on the petitioner to show that there is at least a reasonable or grave doubt that his conviction has resulted from federal constitutional error. *Allen v. Perini*, 424 F.2d 134, 138 (6th Cir.), *cert. denied*, 400 U.S. 906 (1970); *Brecht*, 507 U.S. at 638; *O'Neal v. McAninch*, 513 U.S. at

445. Petitioner has failed to meet this burden concerning this claim.

Petitioner has not shown any instances where the trial court ignored or dismissed statements by jurors that they could not hear the proceedings. On the contrary, the record shows that the trial judge sometimes *sua sponte* instructed witnesses to speak louder. (*See, e.g.* Tr. Vol. IV at 188.) There is no indication in the record that the court reported was unable to hear the proceedings. All petitioner has offered concerning this claim is rank speculation that unspecified jurors inability to hear unspecified testimony or other unspecified components of the proceedings may potentially have prejudiced petitioner. This is far, far from showing that federal constitutional error made any contribution to petitioner's convictions. Habeas corpus relief may not be predicated on "rank speculation." *Bransford v. Brown*, 806 F.2d 83, 86 (6th Cir. 1986), *cert. denied*, 481 U.S. 1056 (1987). Accordingly, petitioner's unsupported, merely speculative claim that the trial judge failed to adequately control the ability of jurors to hear the proceedings is denied.

G. Alleged Prosecutorial Misconduct

Petitioner contends that the prosecutor committed misconduct by asking the victim's stepfather Stanley Broadnax whether he had learned the names of the men arrested for shooting the victim and, after talking about the incident with his stepson Troy Denard, if he (the witness) had went to the police and told them they had arrested the wrong people. The trial court sustained a defense objection to this question. However, the witness

replied in the negative before the court sustained the objection. (Tr. Vol. III at 229-30.)

On habeas review, the standard to be applied to claims of prosecutorial misconduct is whether the conduct was "so egregious so as to render the entire trial fundamentally unfair." *Cook v. Bordenkircher*, 602 F.2d 117, 119 (6th Cir.), *cert. denied*, 444 U.S. 936 (1979). This court must decide whether the prosecutor's statements or other alleged misconduct likely had a bearing on the outcome of the trial in light of the strength of the competent proof of guilt. *Angel v. Overberg*, 682 F.2d 605, 608 (6th Cir. 1982). In deciding whether prosecutorial misconduct mandates that habeas relief be granted, the Court must apply the harmless error standard. *Eberhardt v. Bordenkircher*, 605 F.2d 275 (6th Cir. 1979). The Court must examine "the fairness of the trial, not the culpability of the prosecutor." *Serra v. Michigan Department of Corrections*, 4 F.3d 1348, 1355 (6th Cir. 1993) (quoting *Smith v. Phillips*, 455 U.S. 209, 219 (1982)), *cert. denied*, 510 U.S. 1201 (1994).

This Court is not persuaded that the prosecutor's alleged misconduct concerning this two-part question had any effect on the outcome of petitioner's trial. The evidence at trial showed that Troy Denard had identified his assailants as Darrin Higgins and Higgins's friend whom he did not identify by name. The prosecutor's complained-of inquiry did not produce compelling evidence which prejudiced petitioner. It is possible that the jury could have inferred from this question and its answer in the negative that Troy Denard had identified petitioner as one of his attackers to his stepfather. However, an equally or more logical inference was, that while he was hospitalized, Troy Denard still did not know the identity of the third man who had accompanied Darrin Higgins and him in the

blue car. This Court concludes that the challenged prosecutorial inquiry did not render petitioner's trial fundamentally unfair. Therefore, petitioner's prosecutorial misconduct claim is denied.

VI. CONCLUSION

The court concludes that petitioner's convictions and sentence do not involve a judgment which is an unreasonable application of clearly established federal constitutional law. Further, petitioner has not shown that he was denied the effective assistance of trial counsel. Therefore, petitioner is not entitled to habeas corpus relief.

28 U.S.C. § 1915(a)(3) provides that an appeal may not be taken *in forma pauperis* if the trial court certifies that it is not taken in good faith. An appeal is not taken in good faith if the issue presented is frivolous. The action should not be dismissed as frivolous unless it lacks an arguable basis either in law or in fact. *Neitzke v. Williams*, 190 S. Ct. 1827, 1831 (1989). An action is frivolous "when it is based on either an inarguable legal conclusion or fanciful factual allegations." *Id.* The issues presented herein are not frivolous insofar as they do not lack an arguable basis in either law or in fact. For this reason, the court finds, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal taken by petitioner and proceeding *in forma pauperis* would be taken in good faith.

Accordingly, IT IS HEREBY ORDERED that the petition for a writ of habeas corpus is DENIED and a Certificate of Appealability is GRANTED.

DATED: 5-31-01

/s/ Marianne O. Battani
MARIANNE BATTANI
UNITED STATES
DISTRICT JUDGE